ize seizure in transit even though the consignee be an inebriate; [13] or prevent one from ordering a consignment for his own use.[14] Nor can a carrier refuse a consignment under cover of state prohibition.[15] But the state may regulate the sale of liquor on an interstate steamboat while within its boundaries [16] or the solicitation of orders for interstate shipments.[17] A recent decision holds that under the Wilson Act a state license tax as applied to foreign liquors is valid. *De Bary & Co.* v. *Louisiana*, 227 U. S. 108, 33 Sup. Ct. 239. This seems sound. A liquor regulation, even though it takes the form of a high license tax productive of revenue, is a "police regulation," if so intended, within the meaning of the Wilson Act;[18] and though a distinction is made as to the taxation of interstate and foreign goods, it seems to be founded on the provision of the Constitution forbidding states to lay imposts.[19] Since this statute does not discriminate against foreign liquors and bears no relation to the value of the goods imported, it cannot be objected to as an "import duty." [20]

VALIDITY OF FOREIGN MARRIAGES. — Marriage is a status the creation of which involves a contract made between parties who have a capacity to contract, in accordance with a ceremony prescribed by law. A status being a legal condition, of interest chiefly to the sovereign of the domicile, is usually created by the *lex domicilii*.[1] It would be logical to apply the rule to the creation of the status of marriage. But practical objections of great weight oppose this, especially when the parties are domiciled under different sovereigns. They might be married in one jurisdiction and unmarried in another. The succession of property, legitimacy of issue, and the prevention of concubinage necessitate a rule which will secure uniformity.[2] The rule that the *lex loci contractus* governs alone accomplishes this result.[3] Consequently it is a general rule of the common law that a

---

after the carrier's liability has become that of a warehouseman. Heyman *v.* Southern R. Co., 203 U. S. 270, 27 Sup. Ct. 104.

[13] Adams Express Co. *v.* Kentucky, 214 U. S. 218, 29 Sup. Ct. 633.

[14] Scott *v.* Donald, 165 U. S. 58, 107, 17 Sup. Ct. 262, 265; Vance *v.* Vondercook, 170 U. S. 438, 18 Sup. Ct. 674.

[15] Louisville & Nashville R. Co. *v.* Cook Brewing Co., 223 U. S. 70, 32 Sup. Ct. 189.

[16] Foppiano *v.* Speed, 199 U. S. 501, 26 Sup. Ct. 138.

[17] Delamater *v.* South Dakota, *supra*. This case does not come within the letter of the Wilson Act. The court feels that it is within the spirit of the act and analogous to insurance regulations.

[18] Pabst Brewing Co. *v.* Crenshaw, 198 U. S. 17, 25 Sup. Ct. 552; Phillips *v.* City of Mobile, 208 U. S. 472, 28 Sup. Ct. 370.

[19] See American Steel Wire Co. *v.* Speed, 192 U. S. 500, 521, 522, 24 Sup. Ct. 365, 370, 371; May *v.* New Orleans, 178 U. S. 496, 507, 20 Sup. Ct. 976, 979.

[20] See American Steel Wire Co. *v.* Speed, 192 U. S. 500, 522, 24 Sup. Ct. 365, 370. It is worthy of note, however, that in the leading case of Brown *v.* Maryland, 12 Wheat. (U. S.) 419, the duty bore no relation to the value of the goods, but was simply a tax on the privilege of importing. This difficulty seems to have been disregarded in the cases. As that statute was discriminatory the cases are clearly distinguishable.

[1] Blythe *v.* Ayres, 96 Cal. 532, 31 Pac. 915. See 3 Beale, Cases on Conflict of Laws, 516.

[2] See Scrimshire *v.* Scrimshire, 2 Hagg. Cons. 395, 416–417.

[3] See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 845.

marriage valid where celebrated is valid everywhere.[4] Thus the form of the ceremony is always governed by the *lex loci contractus*.[5] So also in the United States [6] and in the most recent cases in England [7] the common-law rule that capacity in general is determined by the *lex loci contractus* [8] applies as well to capacity to contract marriage. This is true even though one of the parties was under a penal disability at his domicile [9] and married in a foreign jurisdiction to evade the law of the domicile.[10]

Two exceptions to the general rule, however, are commonly noted. First, it is said that a marriage contrary to the recognized Christian conception of that relation, as, for example, a polygamous marriage, is not valid.[11] But since it is a right created by law it must be recognized everywhere as such, even in a state where it could not be created; although the effect usually given to the marriage status need not be given to it.[12] Second, when contrary to a positive statutory prohibition of the sovereign of the domicile, as a marriage incestuous by local law but not universally so treated,[13] or one involving miscegenation,[14] the marriage

[4] STORY, CONFLICT OF LAWS, § 113. The converse is not always true, at least in England. Ruding *v.* Smith, 2 Hagg. Cons. 371. The argument made is that if there is no law or it is impossible or very difficult to comply with its requirements, necessity makes the marriage valid if contracted according to forms prescribed by the *lex domicilii*. See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 890. But where there is no law it seems impossible in the common-law view of territorial law that a valid marriage could take place. Cf. Norman *v.* Norman, 121 Cal. 620, 54 Pac. 143.

[5] Dalrymple *v.* Dalrymple, 2 Hagg. Cons. 54: Scrimshire *v.* Scrimshire, 2 Hagg. Cons. 395.

[6] State *v.* Richardson, 72 Vt. 49, 47 Atl. 103; Stevenson *v.* Gray, 17 B. Mon. (Ky.) 193. Some cases apparently hold that the *lex domicilii* governs capacity. Greenhow *v.* James' Exec., 80 Va. 636. The decisions are preferably to be explained as examples of the exception to the rule of the *lex loci*, discussed *infra*. One case holds that a marriage forbidden by the sovereign of the nationality will be void even though contracted at the domicile of the parties according to its laws. Roth *v.* Roth, 104 Ill. 35. This seems an indefensible decision, especially as the question related to the descent of Illinois land.

[7] Ogden *v.* Ogden, [1908] P. 46; Chetti *v.* Chetti, [1909] P. 67. In these two cases the conclusion is reached after a very full discussion. But the English decisions are extremely confused. See 22 HARV. L. REV. 439.

[8] Male *v.* Roberts, 3 Esp. 163; Milliken *v.* Pratt, 125 Mass. 374. See 15 HARV. L. REV. 382, 385–388. In the Civil law capacity is treated as personal status and therefore controlled by the law of the domicile or nationality. STORY, CONFLICT OF LAWS, § 51 *et seq.* There are, however, many exceptions to the rule. See 3 Beale, Cases on Conflict of Laws, 516.

[9] Commonwealth *v.* Lane, 113 Mass. 458.

[10] Van Voorhis *v.* Brintnall, 86 N. Y. 18; Stevenson *v.* Gray, 17 B. Mon. (Ky.) 193. *Contra*, Stull's Estate, 183 Pa. St. 625, 39 Atl. 16. A number of states have enacted statutes declaring a marriage contracted abroad by its citizens to evade its laws to be invalid. D. C. CODE, § 1287; GA. CODE, § 2424; IND. LAWS, 1905, c. 126, p. 215; LA. ACTS, 1904, No. 129, p. 293; ME. REV. STAT. c. 61, § 9; MD. PUB. GEN. LAWS, Art. 27, § 302; MASS. REV. LAWS, c. 151, § 10; MISS. CODE, § 1033.

[11] Hyde *v.* Hyde, L. R. 1 P. & D. 130. For a discussion of the validity of tribal marriages, see 25 HARV. L. REV. 374.

[12] See 3 Beale, Cases on Conflict of Laws, 517.

[13] Brook *v.* Brook, 9 H. L. Cas. 193. Some of the judges proceeded on the domiciliary theory.

[14] State *v.* Kennedy, 76 N. C. 251; Kinney *v.* Commonwealth, 30 Gratt. (Va.) 858. Where the parties were married while domiciled under a sovereign permitting miscegenation, the validity of the marriage will be recognized in a state where such a marriage is illegal. State *v.* Ross, 76 N. C. 242. *Contra*, State *v.* Bell, 7 Baxt. (Tenn.) 9. It is argued that the validity of a marriage should depend on the "distinctive national

is invalid. A recent Illinois case has construed a statute prohibiting remarriage of a divorced person within a year as invalidating a marriage contracted by its citizens in Missouri within that period.[15] *Wilson* v. *Cook*, 100 N. E. 222. This second class of cases has been severely criticized,[16] and the expediency of the decisions may well be doubted. But every state should have the power to control the status of its citizens wherever they may be. The law should give effect to the *lex loci*, therefore, only when the state of domicile consents to the creation of a status. Such a consent is ordinarily presumed, but when the state exercises its ultimate power to forbid the creation of the status, as the court thought was done by the statute in the principal case, the marriage should everywhere be treated as invalid, even though the requirements of the *lex loci* were fulfilled.[17] Whether the sovereign has exercised this power is a question of legislative intent.[18] The statute, however, should never be held to have extraterritorial effect unless it is a necessary construction, because of the strong public policy in favor of the validity of marriage. Consequently where one section of the code provides that marriages valid where contracted are valid in the state a marriage contracted abroad within the prohibited period will be held valid. *Griswold* v. *Griswold*, 129 Pac. 560. (Colo., Ct. App.)[19]

If the above analysis of the Illinois case is correct the parties could remarry within the year by acquiring a domicile under another sovereign.[20] A possible construction of the statute there considered is that it operates as a limitation on the decree of divorce.[21] Statutes prohibiting marriages during the period allowed for an appeal are generally so construed.[22] But since under this view the parties are not absolutely divorced until a year has elapsed they could not contract a valid marriage anywhere during that time. The great diversity of judicial decision on this subject emphasizes the necessity of a uniform marriage law.

---

policy" of the state. WHARTON, CONFLICT OF LAWS, § 165. The difficulty with this view is that the status would change as the parties moved from one state to another, and the essential quality of uniformity would be gone.

[15] *Accord*, Lanham *v.* Lanham, 136 Wis. 360, 117 N. W. 787. *Contra*, Wood's Estate, 137 Cal. 129, 69 Pac. 900; Dudley *v.* Dudley, 151 Ia. 142, 130 N. W. 785. Since the statute applies to both parties to the divorce it is not a mere penal statute. The cases *contra* to the principal case construe the statute as not having any extraterritorial operation. This construction secures a more just result, and if permissible is preferable. But the court's interpretation probably accords with the legislative intent.

[16] See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 875 *et seq.*

[17] No case has yet arisen which tests the theory this far. As a matter of fact the courts would probably refuse to carry the reasoning to its logical extent.

[18] Lanham *v.* Lanham, *supra.*

[19] Approved and followed in the Supreme Court of Colorado. Loth *v.* Loth's Estate, 129 Pac 827 (Colo., Sup. Ct.).

[20] Pierce *v.* Pierce, 58 Wash. 622, 109 Pac. 45; State *v.* Fenn, 47 Wash. 561, 92 Pac. 417.

[21] Warter *v.* Warter, 15 P. D. 152.

[22] McLennan *v.* McLennan, 31 Or. 480, 50 Pac. 862; Pettit *v.* Pettit, 105 N. Y. App. Div. 312, 93 N. Y. Supp. 1001. *Contra*, Willey *v.* Willey, 22 Wash. 115, 60 Pac. 145. A marriage within the state during the period allowed for appeal was upheld, on the ground that the party was the only one who could appeal, and it was within his power to waive it. Wallace *v.* McDaniel, 59 Or. 378, 117 Pac. 314. By this case the guilty party, but not the innocent party, can remarry within the period.